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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State, *Appellee*.

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

I. THE NATURALIZATION POWER DOES NOT INCLUDE THE POWER TO CREATE A SECOND-CLASS CITIZENSHIP CONDITIONED ON SUBSEQUENT CONDUCT.

Appellee, now for the first time in these lengthy proceedings, openly recognizes that Section 352 of the Immigration and Nationality Act of 1952 can be sustained only if Congress, under the Constitution, has the power to create a special conditional class of citizenship for naturalized citizens.

Appellee has done extensive research and has devoted nearly one-half of its brief in an effort to prove that the power of Congress "to establish a uniform rule

of naturalization" includes the authority to make naturalization conditional upon subsequent conduct and thereby create a separate inferior class of citizenship.

Appellee's efforts to find constitutional authority for Congress to create such a second-class citizenship fail to reveal any basis for the existence of such a power. On the contrary, they confirm the decisions of this Court which express in clear terms the equality of native-born and naturalized citizens and which negate any constitutional right to create a more vulnerable second-class type of citizenship for the naturalized.

In its efforts to establish the existence of such a power of Congress, the appellee lightly passes over *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) 738 and other decisions of the Court which have pronounced in clear terms the equal dignity of citizenship acquired by naturalization.[1]

The classic formulation of this principle by Chief Marshall in *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.) *supra* at 827-828, is quoted in full on page 27 of appellant's brief, but one section we believe merits repetition here:

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to

[1] See Resp. Br. 59. (Appellee's brief entitled "Brief for Respondent" is herein referred to as "Resp. Br." and Appellant's principal brief as "Br.".)

> prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. (22 U.S. at 827).

See also, *United States* v. *Wong Kim Ark*, 169 U.S. 649. The equality of the naturalized citizen in all respects "save only that of the eligibility to the presidency" has been repeatedly confirmed by this Court. *Luria* v. *United States*, 231 U.S. 9, 21; *United States* v. *MacIntosh*, 283 U.S. 605, 624; *Knauer* v. *United States*, 328 U.S. 654, 658.

Appellee, in an effort to overcome the clear meaning of the decisions of this Court, has made a random and extensive search for materials including the debates at the Constitutional Convention and in the First Congress. These materials, however, do not support the claimed power on the part of Congress to create a second-class citizenship, but establish the correctness of the *Osborn* and subsequent decisions cited above.

We shall examine seriatim the attempts made by appellee in this direction.

(1) Appellee contends that "the Constitution embodies the concept . . . that citizenship is a gift which may be bestowed with conditions subsequent as well as precedent." (Resp. Br. 59, see also 15-18).

Appellee purports to find this concept in the constitutional provisions which state that a naturalized citizen may not become President (Article II, Sec. 1), and must wait 7 to 9 years respectively before he is eligible to sit in the House of Representatives and in the Senate. (Article I, Secs. 2, 3).

As this Court has repeatedly held, these political disabilities provided for in the Constitution are exclu-

sive. Congress has no power to limit the rights of naturalized citizens in any other respect. As Chief Justice Marshall stated in *Osborn* v. *Bank of the United States, supra*, 22 U.S. at 827-28, a naturalized citizen "is distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction." See also, e.g., *Luria* v. *United States, supra*, 231 U.S. at 21.

Further, the history of these constitutional provisions shows that they are exclusive and impose not conditions on citizenship itself, but limitations on the exercise of the special privileges of holding specified public offices, not necessary incidents of citizenship as such. These provisions of the Constitution are based on the laws which some of the individual states enacted prior to the adoption of the Constitution. The laws of Maryland, Delaware and Virginia, for example, expressly stated that naturalized citizens shall have equal rights to the native-born citizens, with the single exception of eligibility, at least for certain periods of time, to hold public office. H. Doc. No. 326, 59th Cong. 2nd Sess. p. 8.[2]

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[2] The Citizenship Board appointed in 1906 to study the naturalization laws of the United States referring these state statutes stated:

> "The effect of naturalization in the several states before the Constitution was therefore to remove alienage, the persons naturalized standing in all respects upon the same plane with the natural born citizen, except that he has certain removable political disabilities.
>
> The same principle was applied in constructing the Constitution and in the debates in the Constitutional Convention no one proposed any other principle." H. Doc. No. 326, 59th Cong. 2d Sess. p. 9.

It is thus clear that the framers of the Constitution considered public office to be a special privilege which was not an essential

(2) Appellee (Resp. Br. 16-17) seeks to deduce a Congressional power to attach conditions subsequent to naturalization from the position taken by Madison and Hamilton at the Constitutional Convention. They opposed writing into the Constitution the provisions establishing residence requirements for naturalized citizens to sit in Congress on the ground, among others, that such conditions were unnecessary because Congress

> "is to have the right of regulating naturalization and can by virtue thereof fix different periods of residence as conditions of enjoying these privileges of citizenship." 2 Farrand, *The Records of the Federal Convention of 1787*, 235 (1911).

This statement is at the very most an indication that Congress, absent the constitutional provisions which were finally adopted, would have had the power to fix residence prerequisites which naturalized citizens must meet before they can exercise the "privilege" of holding public office. It does not support a power to condition the retention of the citizenship rights themselves, once granted.[3]

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part of citizenship. Likewise, the right to vote was not considered to be an essential part of citizenship at the time the Constitution was adopted. Discussing the situation in 1787, it is stated in I. Crosskey, *Politics and the Constitution*, p. 440 (1950):

> "• • • The acquisition of the right to vote sometimes confused nowadays with naturalization was not of its essence. Like eligibility to the Presidency or to service in Congress, the right to vote is a political privilege which has never been the right of the whole of our citizenry, even of the 'natural born variety.'"

[3] Indeed, it probably refers to the grant of some rights of citizenship in advance of naturalization (see 3 below).

(3) Appellee further tries (Resp. Br. 17-18) to find support for its position from the debates in the First Congress on the original naturalization bill. Nothing in these debates indicates the existence of a Congressional power to attach conditions subsequent to naturalization.

a. The debate on the original naturalization bill (1 Annals of Congress 1109, 1125 (1790)) dealt with the question whether Congress in adopting an uniform rule of naturalization should make residence for a certain number of years a prerequisite for naturalization. The draft before Congress included a residence requirement. A number of members urged striking this provision and providing that a person could become a citizen by merely taking an oath of allegiance to the United States. The group in favor of immediate naturalization was primarily concerned with the restrictions, such as land ownership, to which new immigrants, as aliens, would be subject if they did not become citizens on arrival.

In this context discussion arose whether this problem could be dealt with by so called "step-by-step" or "progressive" naturalization. The debates made it clear that what was considered was to bestow upon aliens in *advance* of naturalization such certain rights as land ownership, which were then normally enjoyed only by citizens. The Government misconstrues this idea of "step-by-step" or "progressive" granting of rights *before* naturalization as the withholding of rights of citizenship *after naturalization*.

Appellee's misconstruction of the meaning of these debates is largely premised on the misunderstanding of a statement made by John Lawrence of New York.

The Government states that Mr. Lawrence "suggested that the three conditions on naturalization written into the text of the Constitution might be exclusive and questioned whether Congress had the power to impose additional conditions." (Resp. Br. 17). Appellee then indicates that Mr. Madison in his reply confirmed the existence of such a power to condition citizenship. (Resp. Br. 18).

However, the discussion during the debate related only to the right of Congress to impose a residence requirement *before* naturalization. Lawrence argued that no such right existed and Madison argued to the contrary. This is clear from the language used by both.

Thus, when Mr. Madison stated:

> "It may be a question of some nicety, how far we could make our law to admit an alien to the right to citizenship step-by-step; but there is no doubt we may, and ought, to require residence as essential." 1 Annals of Congress 1112.

he was replying to an argument by Mr. Lawrence that Congress could not impose a residence requirement as as a prerequisite to naturalization. Mr. Lawrence stated that he was of the opinion that

> "... Congress has nothing more to do than point out the mode by which foreigners might become citizens. The Constitution had expressly said how long they should reside among us before they were admitted to seats in the Legislature; the propriety of annexing any additional qualifications is therefore much to be questioned." Id. at 1111.[4]

[4] What was meant by step-by-step or progressive naturalization was the bestowal of certain rights of citizenship *in advance of naturalization* also appears from the following statement made immediately after Madison's remark quoted above by Mr. Smith

In any event, even if Congress had a power to adopt a rule of naturalization which delayed the enjoyment of certain privileges until some period after naturalization, it is clear there is nothing in such a power which could condition upon future conduct the retention of citizenship itself when the citizenship was acquired in good faith.

b. Appellee in more general support of its thesis points to the statement made in the same debates by Alexander White of Virginia (Resp. Br. 11) suggesting that if the residence requirement was stricken "another clause ought to be added depriving [naturalized] persons of the privilege of citizenship, who left the country and staid abroad for a given length of time." (1 Annals of Congress 1110). It is clear from the context of this statement that the problem with which Mr. White was concerned was the fraudulent

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of South Carolina who described step-by-step or progressive naturalization as follows, id. at 1112:

> ". . . that a man shall be entitled to certain privileges at the end of one year's residence . . . more in two years, and the whole is completed in three years."

Or as Mr. Clymer similarly stated, id. at 1120-21:

> ". . . foreigners ought to be gradually admitted to the rights of citizenship; and that the residence of a certain time should entitle them to hold property; but the higher privileges of citizenship, such as electing or being elected in office, should require a longer term."

Indeed, for a long period of time, it was the law that one who had made a declaration of intention to become a citizen could enjoy "in the United States certain rights which commonly pertain to citizens of the several states and the United States." H. Doc. No. 326, 59th Cong., 2nd Sess. p. 19. Such rights included voting in both national and state elections, and the rights to hold real property in some states. Id. at 19.

acquisition of American citizenship, a problem with which Congress clearly may deal under the naturalization power.[5] See *Luria* v. *United States*, 231 U.S. 9.

(4) Appellee tries (Resp. Br. 18-19) to find some support for its position in the Jeffersonian argument that all men who have left their own country should be sufficiently relieved of ties to that country to give them the right to renounce their citizenship without the consent of their sovereign. This principle, which was in part expressed in the Act of July 27, 1868, 15 Stat. 223, relates to the right or option of the citizen to give up his citizenship without the consent of this government. This, of course, does not affect the right of the citizens residing abroad to retain his citizenship if he so desires to do so.

(5) The asserted power to impose a condition subsequent upon naturalization has never been employed by Congress any time prior to this legislation. The Nationality Act of 1907, 34 Stat. 1228, which created a rebuttable presumption that naturalized citizens who resided abroad for certain periods had expatriated themselves did not deal with citizenship, but only with the right of diplomatic protection. Any naturalized citizen who returned to the United States was per-

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[5] Mr. White urged that absent a residence requirement such a clause should be added because "[f]oreign merchants and captains of vessels might by this means evade the additional duties laid on foreign vessels." Mr. Madison, referring to Mr. White's statement, noted, id. at 1112:

> "Under such terms, it was well observed by my colleague, aliens might' acquire the right of citizenship, and return to the country from which they came, and evade the laws intended to encourage the commerce and industry of the real citizens and inhabitants of America enjoying at the same time all the advantages of citizens and aliens."

mitted to enter as a citizen. *Camarado* v. *Tillinghast*, 29 F. 2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F. 2d 785 (W.D. Wash. 1926); *Miller* v. *Sinjen*, 289 F. 388 (8th Cir. 1923). See also, 28 Op. Attys. Gen. 507, 508, 3 *Hackworth Digest of International Law*.[6]

The Bancroft Treaties similarly dealt only with a loss of protection. See, *Matter of O*, I. & N. Dec. 321, 323 (1951).[7]

(6) Appellee relies on administrative practice of the State Department. (Resp. Br. 23-24, 28-32). Such practice, as appears from the brief itself, never went so far as to assume that the citizenship of naturalized citizens was conditioned upon residence in this country after naturalization. Some officials believed that voluntary expatriation on the part of naturalized citizens residing abroad may be easier to establish, (see statement by Secretary of State Fish, (Resp. Br. 31), but none considered expatriation to flow automatically from such residence.

In summary, the Government's extensive and painstaking research to which it has devoted nearly half

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[6] The legislative history of the 1907 Act also indicates that the purpose of the Act was not to take away citizenship, but only to ascertain whether protection should be limited. See 41 Cong. Rec. 1466-1467 (1907.) For an excellent discussion on the legislative history of this Act see "Involuntary Loss of Citizenship by Naturalized Citizens Res ling Abroad," 49 Cornell L.Q. 52, 61-68 (1963). Of special pertinence here is the material quoted on page 63 n. 103, 66 n. 108.

[7] Indeed, the position that the Bancroft Treaties deal only with diplomatic protection and not with nationality as was taken by the United States State Department as recently as 1958 in the case before the Italian-United States Conciliation Commission, No. 82, In the Matter of Albert Flegenheimer, not yet published; copies available at the State Department.

of its brief fails to provide any basis for a Congressional power to create a special second-class citizenship for naturalized citizens.

II. THERE IS NO INHERENT POWER TO REGULATE CITIZENSHIP UPON WHICH THIS LEGISLATION COULD BE BASED.

Appellee's brief also seeks to sustain the challenged legislation on the basis of what it calls the "undoubted power" of the United States "to regulate its own national citizenship as an inherent right of sovereignty." (Resp. Br. 57). It claims that this power includes "the authority to deal with serious compromises of allegiance" (Resp. Br. 58-59), which fall short of conduct manifesting a transfer of allegiance from the United States to some foreign power.

This Court has never held that the Congress has such an inherent power to regulate citizenship nor does appellee cite any authority therefor. On the contrary, it seems clear from this Court's recent decisions in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 and *Trop* v. *Dulles*, 356 U.S. 86, that no such power exists.

Such a power to regulate citizenship would, if it were granted to Congress, permit it to expel from the body politic anyone considered undersirable by the legislature. It would give the same powers over the citizen's basic right to membership in political society as over the most minor commercial interests. Such an approach is totally alien to our system of constitutional government and personal rights.[8]

[8] If a power to "regulate citizenship" existed, Congress could take away the citizenship of any person whose views or activities were contrary to the prevailing opinion. The possibilities of such power are limitless.

III. THERE IS NO RATIONAL BASIS FOR THIS LEGISLATION AS A MEASURE TO DEAL WITH COMPROMISES OF ALLEGIANCE.

Appellee attempts to sustain the challenged legislation as a measure designed to deal with possible compromises of allegiance on the part of naturalized citizens residing in their country of origin and their possible reversion to their former nationality. Sought to be sustained on this basis, Section 352 is clearly arbitrary.

As shown in appellant's principal brief, Section 352 takes away citizenship regardless of individual allegiance on the basis of assumed group characteristics of naturalized citizens. It assumes that naturalized citizens who reside abroad are more likely to compromise their allegiance to the United States than the native-born.

Appellee, in its brief, attempts to sustain the legislation on precisely this group characterization. The Government argues that "[t]his provision is proper, not because in all instances the [naturalized] citizen . . . transfers his allegiance but it *often* occurs." (Resp. Br. 68, n. 37). The brief states that "Congress was warranted in concluding that his allegiance to his native land *might* be significantly revised" by residence there. In describing the possible compromise of allegiance by naturalized citizens residing in the country of his origin, the Government's brief continually uses such words as "often," "frequently," "generally" or "normally." (Resp. Br. 59, 61). This also reflects the thinking of the Cabinet Committee which recommended this legislation. See e.g. material quoted Resp. Br. 65-67.

An individual American citizen clearly may not be deprived of his citizenship on the basis of characteristics imputed to other or even most of his fellow citizens of the same class.

As we stated in our principal brief, pp. 31-34, no such power exists. We repeat from pp. 33-34:

> "The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct substantiated by statistics, it was more likely to be committed by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man."

The Government has been able to cite only a single case where this Court has upheld a discrimination between citizens on the basis of such assumed group characteristics. *Hirabayashi* v. *United States*, 320 U.S. 81. There, as the Court expressly stated, (id. at 100), the classification was upheld *only* because of the existence of war and the imminent threat of invasion. (See Br. 34).[9]

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[9] The other cases cited in support of a classification such as made here involved classification between aliens and citizens or between aliens ineligible for citizenship and those eligible for citizenship and provide no basis for a classification of citizens.

The Government has omitted to mention a previous example of group legislation against a class of citizens whose reasoning coincides with that of the Government's brief. See *Plessy* v. *Ferguson*, 163 U.S. 537. One comment of the dissenting justice seems to us worth noting here:

> "Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens in the United States, or of Protestants and Roman Catholics?" *Id.*, 163 U.S. at 558.

In any event, it is clear that even if less important rights could be taken away on the basis of classifications based on generalized conduct, the precious right of citizenship clearly cannot be taken away on such a basis.

In support of the group classification Congress has adopted, appellee stresses the important function of residence in the United States in order to assimilate the foreigner who comes to this country, citing sociological works. (Resp. Br. 60-64). Residence in this country is, of course, essential to assimilation. This is why Congress has made 5 years residence a prerequisite to naturalization and why residence has been a prequisite from the beginning. Act of March 26, 1790, 1 Stat. 103. Further, it is clear that if a naturalized citizen leaves the country within 5 years after naturalization, a presumption will arise that he obtained his citizenship fraudulently by stating under oath that he intended to reside in the United States. Section 340(d) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(d). Thus, in the usual case under Section 352, a naturalized citizen who takes his citizenship abroad will usually have resided in the United States for 10 years. During this time, he will, in most cases, have become thoroughly Americanized and will not readily re-acquire his former allegiance. Of course he may do so. However, whether such a citizen nevertheless does in fact abandon his allegiance and acquire a new allegiance is a question which as we have shown must be decided on an individual basis and not by imputing guilt on the basis of the actions and attitudes of others.[10]

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[10] As the Government notes (Resp. Br. 60-61) that, "ties formed in childhood are stronger than those acquired in later life." Thus, a naturalized citizen who, as appellant, lived in the United States from age 5 to age 20 and who has attended American schools and

IV. THE GOVERNMENT DOES NOT SHOW A RATIONAL NEXUS BETWEEN FOREIGN AFFAIRS POWER AND THE CHALLENGED LEGISLATION.

a. Legislative History

The essential emptiness of the Government's case seeking to justify the discriminatory provisions of Section 352 as a means to deal with international complications is indicated by its failure to rely on or even mention the cases which were presented to Congress as typical of the problems believed to require the challenged legislation.

The Cabinet Committee which recommended enactment of the challenged legislation presented to Congress 13 cases which it said were "illustrative of many presented to the State Department in recent years" and which are "typical and will be sufficient, it is believed, to show the general character of the problem. . . ." Nationality Laws of the United States (1938), part 1, House Committee Print, 76th Cong., 1 Sess. p. 72. The 13 cases appear id. at 72-75.

Not a single one of these "typical" cases presented to Congress involved complications with a foreign gov-

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colleges, will have been so thoroughly assimilated into American culture that he would appear to be no more likely to abandon his allegiance to the United States upon residing abroad than a native-born. This also has been recognized by Congress which in the exemptions to Section 352 has attached special significance to residence in the United States prior to attaining the age of 21. Sections 353(8) and 354(5). Nor is the case of a naturalized citizen who grew up in the United States an unusual one. Undoubtedly, there are large numbers of naturalized citizens who were brought to the United States at an early age, and who have, therefore, been completely assimilated into American culture and to whom any other country is necessarily foreign.

ernment. Most of the cases simply involved long residence abroad with no indication that such residence might cause diplomatic problems different from those raised generally by residence abroad of any citizen. In two of the cases the naturalized citizen had returned to the United States after long residence abroad. (!)[11] In one case the naturalized citizen resided "partly" in the United States but had a wife and ten children in Italy. None of the cases indicate any problem of any kind with the foreign government of the place of residence or former residence.[12]

Judge Fahy, in his dissenting opinion below, 218 F. Supp. 302, 318 n. 4 (R. 59) stated:

"It seems fairly clear from the discussion centering upon the 13 illustrative cases cited in sup-

[11] One of the purposes of the challenged legislation apparently was to prevent the return to this country of undesirable naturalized citizens. Mr. Flournoy, Assistant Legal Advisor, testified that the legislation was necessary because "the courts have held that you can not keep them out, no matter what you have against them. They may not be very loyal or may have a criminal record, or one thing or another, but if they are citizens they can come back into the United States." (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 136 (1940).

[12] In two of the cases the naturalized citizens left within less than five years of their naturalization and might also be deprived of their citizenship on grounds of fraud. In two other cases the naturalized citizen served for years in a foreign army and presented the question before this Court in *Marks* v. *Esperdy*, No. 253 this Term. Only one case out of the thirteen involved a request by a naturalized citizen residing abroad that the United States Government present a claim against a foreign government on his behalf. In that case, however, the Department of State refused to present the claim because it determined, under the standards of the 1907 Act, that citizenship had been abandoned. The decision was made prior to the statute and no representations were made to the foreign government.

> port of Section 352(a) when it came before Congress in 1938, that what was sought to be avoided was the necessity in each case to decide—either administratively or judicially—whether an individual had abandoned his American citizenship by continued residence in the land of his birth or prior nationality. These illustrative cases do not disclose what disputes arose, if any, between the Government of the United States and the foreign governments in connection with the various individual claims for passports, registration, or presentation of claims."

Since no actual or possible foreign affairs complications were involved in the only cases presented to the Congress to justify the legislation, it is not surprising that appellee ignores this aspect of the legislative history.

Instead, its brief avoids these more current matters and seeks to make much of the well-known Nineteenth Century problems involving the protection of American citizens which were sought to be subjected to military service by the countries of their former nationality, principally Prussia and Great Britain. Of course, there is not the slightest mention of these old conscription problems in the legislative history of the 1940 or 1952 Acts and no indication that this problem was still in existence or that the challenged legislation was designed to meet this problem.[18]

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[18] Appellee (Resp. Br. p. 22, n. 13) embellishes the history of the Nineteenth Century with a list of the military operations which the United States has undertaken to protect its citizens residing abroad "between 1831 and 1912." These incidents admittedly deal with "American citizens both native born and naturalized." There is no indication that such incidents were caused because of the residence abroad of naturalized citizens. Indeed, many of these incidents (those occurring in China, Japan and Korea) could not have involved naturalized citizens residing in their country of origin, because Orientals were ineligible for naturalization until 1952.

As indicated in our principal brief (p. 43), and conceded by appellee (Resp. Br. 11), this legislation can be sustained only if it was an appropriate means to deal with the problems with respect to which Congress has attempted to deal. *Perez* v. *Brownell*, 356 U.S. 44, 59. Congress, it is clear, however, did not enact this legislation to deal with the problems resulting from the international complications which might result from the residence abroad of naturalized citizens. The 13 "typical" cases, as well as the legislative history quoted extensively in both appellant's and the Government's brief show that the legislation was adopted by Congress to strip American citizenship for a completely different reason. See, *e.g.*, Br. 36-38, Gov. Br. 65-67.

The problem with which Congress attempted to deal was the naturalized citizen residing abroad who had abandoned his allegiance to this country. Congress adopted the automatic 3 and 5 year expatriation period to do away with inconvenience involved in a case-by-case determination of allegiance in such case. (Br. 7) There is no indication that any international complication actuated the adoption of this legislation.

Appellee insists (Resp. Br. 11, 50, n. 33, 70, 71; n. 40) that Section 352(a)(2) of the Act which provides for the expatriation of a naturalized citizen who resides for 5 years in any country other than the country of origin is of no relevance here.

We submit that for determining the congressional purpose in enacting the challenged legislation (Section 352(a)(1)) this companion provision is highly relevant. None of the possible foreign affairs problems which have been urged in support of Section 352(a)(1), such as the claims which a country of

origin might make on a person whom it still regards as its citizen, notwithstanding American naturalization, could support Section 352(a)(2). This confirms our view that both sections were enacted to deal with abandonment of allegiance, and not to resolve international complications.

b. Current Problems

Absent any evidence that Congress enacted this legislation to deal with any actual international complications resulting from the residence abroad of naturalized citizens, the government attempts to support the legislation on the basis of alleged complications which have resulted from the residence abroad of naturalized citizens *after* this legislation was adopted. Even assuming arguendo that the legislation could be sustained on such basis, it is clear that the Government has not done so.

The Government, in its brief, states that "the State Department advises us that protection of naturalized citizens is today a sensitive matter in a number of countries, particularly, Belgium, Greece, Iran, Israel, Switzerland and Turkey * * *" (Resp. Br. 45)

Such a general statement is of course meaningless in the present context.[14]

[14] It is certainly not the equivalent even of the statement from the Secretary of State that he would recommend this legislation today in order to deal with these problems raised in these countries, and that there was no reasonable way in which the particular problems in those countries could be dealt with without depriving American citizens of their citizenship in the many countries which clearly and fully recognize American naturalization.

Such a statement on the part of the Secretary of State seems quite unlikely particularly in the light of the insistence of President Johnson on the equal rights of all citizens. See, e.g. 1964 Congressional Quarterly Weekly Reports 478.

It is however followed by some specification of the problems contended to be relevant. These pertain to claims of obligations of military service by certain countries in which naturalized American *tourists* who traveled for a short period of time. (Resp. Br. 45-46) The Government suggests, without any supporting reasons, that more serious foreign policy problems would be likely to arise from longer stays in such countries. (Resp. Br., p. 46). In fact, the instances cited by the Government show that where a foreign country refuses to recognize American naturalization and desires to put a claim on its former citizen, it will do so immediately, and not wait for three years. This also seems to be supported by the thirteen "typical" cases cited by the Cabinet Committee where long-term residence abroad was not associated with problems of protection. Thus the recent incidents of the problems of tourists certainly do not support the present legislation. Even if we accept the premise that if a citizen causes any complication, the Government has the right to cut off his citizenship, the only legislation the cited incidents would support is denaturalization of all naturalized citizens who travel abroad even for the shortest periods.

The labored reference to current troubles of tourists seems only to confirm appellant's position that Congress provided the expatriation of naturalized citizens residing abroad for the three or five year period, not because of the international complications likely to arise as a result of such long residence, but rather in order to deal with abandonment of allegiance by naturalized citizens on a group rather than on an individual basis. As shown in our principal brief, pp. 31-34, the legislation can not be sustained on such a basis.

c. Foreign Statutes

Furthermore, appellee, in support of the reasonableness of this legislation refers to the laws of other countries. An examination of these laws shows that, contrary to appellee's assertion, legislation similar to Section 352 is rare indeed.[15]

In summary, Section 352 clearly was not enacted by Congress as a measure to deal with international complications. Nor is it supported by an evidence of an entirely different type of subsequent international complications not presented to Congress when it enacted this legislation in 1940.

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[15] There appear to be only 9 countries which provide for the expatriation of naturalized citizens on the basis of residence abroad alone. These countries are the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, Thailand, and Venezuela. (Resp. Br. 47). (New Zealand also listed in the category by appellee recently repealed such a law and has no provision at all for loss of citizenship because of residence abroad, "Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad," *supra*, 49 Cornell L.Q. at 77, n. 197.) The countries with such laws have completely different legal systems from ours and do not have large immigrant populations.

Great Britian and Australia, for example, expatriate naturalized citizens residing abroad *only* if they fail to file annual declarations of intent to remain citizens. (Resp. Br. 48). The proposed United Nations Convention on the Reduction of Statelessness adopted a similar standard. (Resp. Br. 49). Such provisions are not even remotely comparable to the automatic expatriation of naturalized citizens residing abroad regardless of their allegiance and of their intent to remain citizens.

"Large immigrant countries of the Western Hemisphere including Argentina, Bolivia, Colombia, Chile and Uruguay, which are more akin to the practical necessities and historic background of the United States, do not have provisions for loss by residence abroad at all." "Involuntary Loss of Citizenship by Naturalized Citizens Residing Abroad," *supra*, 77-78, n. 197.

Moreover, since the legislation was not an attempt to deal with any actual problems of international complications involved in the residence abroad of naturalized citizens, it cannot be said that Congress, if any such problems had been presented to it, would not have adopted much more limited measures, if any at all, to deal with them.

In any event, as Judge Fahy pointed out in his dissenting opinion below, to permit this discriminatory legislation on such uncertain and unsubstantial speculation as to possible difficulties would "create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen." (R. 59), 218 F. Supp. at 322.

V. SECTION 352 IS NOT CONSTITUTIONAL AS APPLIED TO APPELLANT.

Appellee contends that even if Section 352 were unconstitutional as applied to others, it is constitutional as applied to appellant. (Resp. Br. 82-89)

It is the Government's position that because appellant is living with her husband, who practices his profession in Germany, and intends to do so for the foreseeable future, the statute is not unconstitutional as applied to her. The Government asserts that "In effect, appellant is seeking the benefits of citizenship while remaining a foreigner." (Resp. Br. 85)

The fact is, however, that appellant is no more a foreigner than any other American woman residing abroad with her husband. The only thing that differentiates her from other American women living abroad with their husbands is her foreign birth.

The Government asserts that a person who resides abroad with no immediate intention to return is "most likely to renew full attachment to the counry of residence." (Resp. Br. 84) While an intent not to return may in certain cases be indicative of a lack of allegiance, it clearly is not so here. The only reason for appellant's residence abroad is to be with her husband, a purpose totally consistent with continued allegiance to this country, a conclusion implicit in the decision of the Congress not to seek to remove the citizenship of women in identical situations who were born here.

On the contrary, as the appellee concedes elsewhere (Resp. Br. 60-61), the fact that appellant was educated in this country puts her into the category of citizens least likely to abandon allegiance to this country.

The Government further urges that the impact of expatriation upon the individual is "much less onerous when the naturalized citizen has no desire to return to the United States." (Resp. Br. 85) The Appellee concedes, however, that the expatriate loses "the right to return if adversity or some other unforeseen circumstances makes this desirable sometime in the future." (Resp. Br. 85) The residence abroad of an American woman with her foreign husband is usually premised up such uncertain factors as the continued life of the husband and on the political situation in the country of residence. The fact that there is no present intention to return to the United States does not make any less valuable the right to return to the United States at a future date. On the contrary, the assurance that a woman married to a foreigner has the right to return home is vital. The Constitution does not

permit an American woman, native-born or naturalized, to be abandoned by her country in time of personal disaster or political upheaval.

Appellee, in its attempt to minimize the effects of expatriation, has suggested that appellant could obtain German naturalization easily if she so desired. (Resp. Br. 7) This is no doubt the case. It is undoubtedly true that Mrs. Schneider and the many American women—born or naturalized—residing with their husbands abroad could readily, under the laws of the countries of residence, adopt the nationality of those countries if they so desired.

The record shows, however, that Mrs. Schneider, like many American women born or naturalized in the same situation, does not so desire; that she regards the United States as her country; and that she wishes to keep her United States citizenship. She has indeed deliberately chosen to suffer the damage and disadvantages of statelessness rather than to accept German or any other citizenship. (R. 9)

Appellee in its statement of facts, (Resp. Br. 7), however, mis-states the record in an attempt to suggest that Mrs. Schneider still retains the German citizenship which she acquired at birth.[16] This suggestion flies in the face of the record.

The complaint in paragraph 15(R. 4) states that under German law, plaintiff "was and is a stateless person." The affidavit of plaintiff in support of her motion for summary judgment sets forth her stateless status in circumstantial detail as quoted in the note

[16] Equally without basis, see infra, it questions whether she has made any claim to German citizenship, or whether she has contested her classification as a stateless person.

below.[17] No counter-affidavit was filed. The court below found "The plaintiff is now stateless" (R. 35) The record is clear and conclusive. It cannot be set aside by counsel's conjecture that the German law might differ from the construction given it by the competent German authorities.[18]

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[17] The uncontradicted affidavit states:

"7. I have been able to acquire from the local authorities in Germany an identification paper as a stateless person . . ."

"The action in question places me in a position where I have no nationality." (R. 8).

"I have no political loyalty or allegiance either to Germany or any other country except the United States." (R. 9).

• • • •

"When I lost my United States passport by the refusal of the American Counsul to extend it, the local police asserted that German law required my expulsion and it was only after much discussion and difficulty that I was granted permission to stay for an interim period. . . ." (R. 11).

• • •

[18] In the face of the clear position of both Mrs. Schneider and the German authorities that Mrs. Schneider does not have German citizenship, counsel have exercised their ingenuity in construing Germany's Nationality Act of 22nd July, 1913, so as to suggest that Mrs. Schneider may not have lost her German citizenship and may now be a German citizen. (Resp. Br. 7, n. 5.)

They refer to Sections 19 and 25 of the German Nationality Act United Nations Legislative Series, *Laws Concerning Nationality* (1954). They read Section 25 to provide that a person having a legal representative loses German citizenship only if he is in a position to apply for release of citizenship to a German court and suggest that there is no evidence that this procedure was followed. Counsel, however, omit to note that the provision for release of citizenship cited by them specifically states that the consent of the specified court is *not* necessary if the application is made by a mother responsible for the custody of the child who is also surrendering her own German citizenship. Section 19, para 2. Accordingly, no application to a German court was necessary in

VI. RESIDENCE IN COUNTRY OF ORIGIN IS CLEARLY CONSISTENT WITH ALLEGIANCE AND CAN BE NO BASIS FOR EXPATRIATION UNDER THE DECISIONS OF THIS COURT

As shown on pp. 58-61 of our principal brief, this Court has never held that Congress may attach expatriation to an act such as residence abroad, which is completely consistent to American citizenship.

In *Mackenzie* v. *Hare*, 239 U.S. 299 and *Savorgnan* v. *United States*, 338 U.S. 491, the Court upheld the constitutionality of statutes which attached expatriation to acts through which the citizenship of a foreign country was acquired.

In *Perez* v. *Brownell*, 356 U.S. 44, the majority of this Court upheld the constitutionality of the expatriating statute because it felt that voting in a foreign political election could rationally be deemed to connote both lack of allegiance to the United States and allegiance to a foreign country.

Indeed, this Court's decision in *Perez*, as well as both the concurring opinion of Mr. Justice Brennan and the dissenting opinion of Mr. Justice Stewart in

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order for the naturalization of Mrs. Schneider through her mother automatically to terminate her German citizenship.

There are many other reasons why the German authorities are right that Mrs. Schneider is not a German citizen which need not be gone into now. We cite only one more. Professor Schaetzel of Bonn University, in his leading commentary on the German Nationality Act. "*Das Deutsche Staatsangehoerigkeitsrecht*" (2nd Ed. 1958), page 201, states specifically that a release from German citizenship remains valid even though the parties have neglected the procedure of obtaining the court approval mentioned under Section 19, and cites for this proposition two other leading German authorities: Lichter, p. 124; Keller-Trautmann, p. 250.

Kennedy v. *Mendoza-Martinez, supra,* 372 U.S. at 187-188, 241, clearly suggest that the congressional power to expatriate is limited to conduct which may be deemed in derogation of undivided allegiance to this country. (See Br. 59-61.)

Appellee, to bring the challenged legislation within these limits, contends that voting in a foreign election, the expatriating act in *Perez,* "is more consistent with allegiance to the United States than prolonged residence in one's own native country * * *." (Resp. Br. 12)

We submit that this is clearly not the case. Voting in a foreign election involves, of course, participation in the political affairs of a foreign country. It was on this ground that the majority in *Perez* held that Congress had the power to say that this act was proof of political allegiance to that country rather than the United States.

On the contrary, residence in a foreign country in itself represents in no way a participation in its political affairs, nor in any other way carries with it an allegiance to the country of residence. This Congress has recognized in placing no restriction on the residence abroad of native-born citizens.

The fact that the country of residence is the country of former nationality does not change the nature of the act. The residence there of a naturalized citizen in his former country, as a residence of any citizen abroad may be, as here, for personal or business reasons and is not, of course "of significance politically." *Perez, supra,* 356 U.S. at 62. It serves as no basis for a claim that political allegiance to the country of residence is involved.

VII. SECTION 352 IS PENAL

Appellee contends that Section 352 is not penal because "since residence abroad is not morally reprehensible it is inherently unlikely that Congress would seek to punish it." (Resp. Br. 89.)

On the other hand, appellee seeks to sustain this legislation as a measure to deal with "serious compromises of allegiance." (Resp. Br. 59, 67.)

The Government cannot have it both ways. If this is a measure to deal with serious compromises of allegiance, and we submit that it is, the conduct involved is clearly reprehensible. The statute involves conviction of disloyalty without trial and perpetual banishment as punishment.

Appellee insists there is no basis in the legislative history for considering the challenged legislation as penal. The legislative history, however, clearly reflects the intention of Congress to apply expatriation as a sanction because it regarded it disloyal conduct for naturalized citizens to reside abroad. See materials quoted, Br. 36-37.

The punitive nature of the legislation is further reflected by the fact that it was expressly designed to apply, unlike the 1907 Act, to naturalized citizens who returned to the United States after the three or five year periods of residence abroad provided for in the statute have run. See page 16, *supra*. None of the reasons urged in support of the statute would apply to such a person. The only basis for denying to such a person the right to return home to this country as a citizen is to punish him.

The punishment without trial is clearly invalid under the Fifth and Sixth Amendment and cruel and unusual punishment under the Eighth Amendment.

CONCLUSION

Appellant is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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